80-1316

No.

Office-Supreme Court, U.S.
FILED
FEB 4 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSETTE CLAIR BAUER, Nee GEISSER,

Petitioner,

v.

UNITED STATES OF AMERICA and
HECTOR GRABER, CONSUL GENERAL OF
THE GOVERNMENT OF SWITZERLAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LYNN PICKARD
Post Office Box 2423
Santa Fe, New Mexico 87501
(505) 988-4469

WILLIAM C. MARCHIONDO
Post Office Box 568
Albuquerque, New Mexico 87103
(505) 247-0751

CHARLES LOUIS ROBERTS
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

Attorneys for Petitioner.

February 4, 1981

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED

1. Whether individual rights granted by the Constitution prevail over obligations imposed by treaties with foreign nations.

2. Whether the Executive has the power to decline to extradite under the treaty on extradition between the United States and Switzerland.

3. Whether that power should have been utilized in this case under a plea bargain agreement requiring the United States to do everything possible to avoid petitioner's extradition.

4. Whether the finding of that district court that the United States had not used it best efforts to avoid extradition, as it was bound to do under the plea bargain, was clearly erroneous.

PARTIES

The caption of the case in this Court contains the names of all parties.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. IF THE DOCTRINE STATED IN REID v. COVERT, 354 U.S. 1 (1957), THAT INDIVIDUAL CONSTITUTIONAL RIGHTS TAKE PRECEDENCE OVER GOVERNMENT TREATY OBLIGATIONS IS NOT YET SETTLED, IT SHOULD BE SETTLED BY THIS COURT. IF IT IS SETTLED, THE COURT OF APPEALS DECISION, WHICH TREATED MS. BAUER'S RIGHTS AS INFERIOR TO THE GOVERNMENT OBLIGATION, IS IN CONFLICT WITH IT 10

II. THE EXECUTIVE BRANCH HAS THE POWER TO DELAY OR DENY EXTRADITION UNDER THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND THE CONFEDERATION OF SWITZERLAND 13

III. UNDER A PLEA BARGAIN AGREEMENT WHICH BOUND THE EXECUTIVE BRANCH TO "DO EVERYTHING POSSIBLE" TO AVOID EXTRADITION, THE EXECUTIVE BRANCH IS OBLIGATED TO PREVENT EXTRADITION 13

IV. THE COURT OF APPEALS' FINDING THAT THE UNITED STATES HAD USED ITS "BEST EFFORT" TO AVOID MS. BAUER'S EXTRADITION TO SWITZERLAND, WHEN THE DISTRICT COURT HAD FOUND TO THE CONTRARY, CONSTITUTED SUCH AN EXTREME DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN

Page

EXERCISE OF THIS COURT'S POWER OF SUPERVISION 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979) 17

Gallegos v. United States, 466 F.2d 740 (5th Cir. 1972) 14

Geisser v. United States, 513 F.2d 862 (5th Cir. 1975) . . . . . *passim*

Perma Research & Development Co. v. Singer Co., 308 F. Supp. 743 (S.D.N.Y. 1970) 17

Petition of Geisser, 627 F.2d 745 (5th Cir. 1980) 1, 8, 9, 11, 12

Petition of Geisser, 554 F.2d 698 (5th Cir. 1977) 2, 7, 14, 19

Petition of Geisser, 414 F. Supp. 49 (S.D. Fla. 1976) 2

Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144 (10th Cir.), cert. denied, 439 U.S. 862 (1978). 16

Reid v. Covert, 354 U.S. 1 (1957). . . . . *passim*

Santobello v. New York, 404 U.S. 257 (1971) 9, 10, 15

Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980) 15

Torres v. Puerto Rico, 442 U.S. 465 (1979) 12

United States v. United States Gypsum Co., 333 U.S. 364 (1948). 16

Vohs v. Dickson, 495 F.2d 607 (5th Cir. 1974). 19

Wacker v. Bisson, 348 F.2d 602 (5th Cir. 1965) 14

Whitson v. Yaffee Iron & Metal Corp., 385 F.2d 168 (8th Cir. 1967) 16

Cases, continued: Page

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 19

Constitutional Provisions, Treaty, Statutes and Rules:

Federal Rule of Civil Procedure 52(a) 2, 16

Treaty on Extradition with the Swiss Confederation, May 14, 1900, 31 Stat. 1928, T.S. No. 354 . . . . . 2, 6

U.S. Const., Amend. V 2, 5

U.S. Const., Amend. VI 2

18 U.S.C. §3184 2

18 U.S.C. §3186 . . . . . 2, 14-15

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 5

28 U.S.C. §2241 5

28 U.S.C. §2255 5

Other Authority:

4 Hackworth, *Digest of International Law* §338 (1942) 14

4 Moore, *International Law Digest* §616 (1906) 14

Note, *Executive Discretion in Extradition*, 62 Colum.L.Rev. 1313 (1962) 14

Webster's Third New International Dictionary, p. 208 (1961) 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

JOSETTE CLAIR BAUER, Nee GEISSER,

Petitioner,

v.

UNITED STATES OF AMERICA and
HECTOR GRABER, CONSUL GENERAL OF
THE GOVERNMENT OF SWITZERLAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals from which Ms. Bauer now petitions for certiorari, which appears in the appendix hereto, pp. 1a-24a, is reported at 627 F.2d 745 (5th Cir. 1980).[1] The two prior opinions of the Court of Appeals in this case, which appear in the appendix at pp.

---

[1] This opinion will be subsequently referred to as *Geisser III*.

63a-86a and 32a-55a, are reported at 554 F.2d 968 (5th Cir. 1977)[2] and 513 F.2d 862 (5th Cir. 1975).[3]

The district court's oral ruling and its findings of fact and order, from which the first appeal was taken, and which appear in the appendix at pp. 25a-27a and 28a-31a, are unreported. The district court's opinion following the first remand and from which the second appeal was taken, which appears in the appendix hereto, pp. 56a-62a, is reported at 414 F. Supp. 49 (S.D. Fla. 1976). The district court's order from which the third appeal was taken, which appears in the appendix at pp. 87a-88a, is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 10, 1980. A timely petition for rehearing was denied on November 6, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

Insofar as relevant to this case, the text of the Fifth and Sixth Amendments to the United States Constitution; the Treaty on Extradition with the Swiss Confederation, May 14, 1900, 31 Stat. 1928, T.S. No. 354; 18 U.S.C. §§3184, 3186; and Rule of Civil Procedure 52(a) are reproduced in the appendix hereto, pp. 93a-104a.

---

[2]This opinion will be subsequently referred to as *Geisser II.*

[3]This opinion will be subsequently referred to as *Geisser I.*

STATEMENT OF THE CASE

This case concerns the efforts of the petitioner [Ms. Bauer] to compel the United States to honor a plea bargain agreement made with her. The three opinions rendered by the Court of Appeals in this case contain the facts material to the questions presented. In the first such opinion, Chief Judge Brown introduced the case as follows:

> This is an extraordinary case calling for extraordinary action. It is a case of the great United States going back on its word in a plea bargain . . . which assured the Government vital indispensible evidence leading to conviction of principals in a grand scale international heroin importing conspiracy. The effect of part of the bargain was that the defendant-turned-states-evidence would not be deported[4] to Switzerland. . . .

Geisser I, Appendix at p. 32a.

With about two and a half years left to serve on a sentence for aiding in a murder, Ms. Bauer escaped from a Swiss prison in 1964. She was apprehended in Miami in 1967 attempting to bring heroin into this country. Because the United States suspected that she was a member of a large narcotics organization, the United States reached a plea bargain agreement with her.

The substance of that agreement was that Ms. Bauer was to waive her constitutional rights and plead guilty to a new indictment. She was to serve a certain sentence. She was to provide intelligence information concerning

---

[4]In the early stages of this litigation, the words deportation and extradition were oftentimes confused. In fact, the case concerns only extradition.

the international narcotics trade and was to testify, if necessary, against the members thereof, including her original attorneys. In return the United States was to insure her early release from prison and at least use its best efforts to assure that she was not returned to Switzerland. *Geisser I*, n. 4, quoting from Brief for the Appellant, United States Government, Appendix at pp. 35a-36a.

Ms. Bauer did plead guilty to the reduced charges; the sentence aspect of this case has been rendered moot because, having served the sentence, she is no longer in confinement pursuant to a sentence. The only remaining issue is that concerning extradition. It should be noted that after being free on bond for many years pending this litigation, Ms. Bauer voluntarily surrendered herself to the United States Marshall upon learning that a warrant had been issued for her arrest pursuant to the Court of Appeals' directive. She is presently in confinement for this reason.

It is agreed that Ms. Bauer upheld her end of the plea bargain to the greatest possible extent in revealing information and serving as a witness. In the words of the United States Attorney handling the case:

> There is no doubt that Bauer and Lambert cooperated beyond 100%. They were completely debriefed by U.S. Customs and other officials of the United States Government. Their cooperation led to numerous arrests, indictments and convictions of major narcotics figures in France and the United States. They testified in two major cases and I have been repeatedly told by U.S. Customs officers of the "fabulous" information given by Lambert and Bauer. It was my understanding from customs agents and narcotics agents who have better knowl-

> edge of this, that the information supplied by Lambert and Bauer was the beginning of the major breakthrough of the French, Corsican and European narcotic organizations.
>
> *Geisser I,* Appendix at p. 39a.

She had an outstanding memory for names, dates, places and other facts and was one of the most impressive witnesses the district judge had ever seen in a lawsuit. *Geisser I,* Appendix at pp. 41a-42a.

When it appeared that the United States was not going to live up to its part of the plea bargain, Ms. Bauer brought a proceeding for habeas corpus and other relief under 28 U.S.C. §§2241 and 2255 alleging a denial of constitutional rights particularly under the Fifth Amendment to the United States Constitution in that the plea bargain was breached. The district court's jurisdiction was thus predicated on the foregoing statutes and on general federal question jurisdiction. 28 U.S.C. §1331. This suit was filed six years after the date of the plea bargain. During these six years the United States had done nothing to fulfill its part of the plea bargain. *Geisser I,* Appendix at p. 45a.

The district court heard testimony and received documents concerning the plea bargain. Examples of such testimony are reproduced in the appendix hereto at pp. 107a-113a. On the one hand, Ms. Bauer testified that the Government promised that she would not be deported back to Switzerland. She was assured that the Government protects its witnesses and there was accordingly no doubt in her mind but that she would not be returned to Switzerland. Appendix, pp. 109a-111a. On the other hand, one witness testified that no promise relating to extradition was ever made to Ms. Bauer. Appendix, p. 113a. Still other witnesses or documents prepared by

these witnesses indicated that there was no absolute promise. Rather the promise was one to use best efforts or to do everything possible to avoid Ms. Bauer's extradition to Switzerland. Appendix, pp. 107a-108a, 111a-112a. Nonetheless, these other witnesses communicated to Ms. Bauer their belief that the Government would, in fact, see to it that she was not returned to Switzerland. Appendix, pp. 108a-109a, 112a-113a.

The district judge's oral remarks at the conclusion of the hearing used the words "best efforts." But he also said that he found that Ms. Bauer was of the opinion that there was a definite agreement and there was no question in his mind but that the definite agreement was "precisely what the Government was promising and what they were agreeing to." Appendix, pp. 25a-26a. The district court's formal findings reflect that a definite agreement was made. Appendix, p. 29a. It therefore vacated the order of extradition that Switzerland had obtained pursuants to its treaty with the United States, Treaty on Extradition with the Swiss Confederation, May 15, 1900, 31 Stat. 1928, T.S. No. 354. A copy of this order of extradition is found in the appendix hereto at pp. 105a-106a.

The United States appealed, raising a number of procedural grounds. The Court of Appeals was extremely concerned that the United States had breached the plea bargain. It noted that even assuming the bargain to be a best efforts one only, there was an outright failure to comply. It remanded the case for an authoritative declaration of the position of the United States regarding its efforts to fulfill its part of the plea bargain. Further, if those efforts were not successful in avoiding Ms. Bauer's extradition, the district court was to hold further hearings. *Geisser I,* Appendix, pp. 32a-55a.

After the remand, the Government began communicating with the Swiss Government about the Bauer matter. These communications consisted of one meeting and two exchanges of diplomatic notes. These communications explained the predicament of the United States as having conflicting obligations to Ms. Bauer under her plea bargain and to Switzerland under the treaty. The Swiss Government was urged to withdraw its extradition request. Switzerland refused.

Following this, Switzerland was allowed to intervene in the proceedings and a hearing was held in the district court. The United States and Switzerland took the position that the meeting and two exchanges of notes constituted "best efforts" to avoid extradition and, therefore, the extradition should proceed. No evidence, apart from documents detailing the efforts and affidavits concerning the safety record of Swiss prisons, was introduced. The district court reiterated its finding that an absolute promise had been made and noted that the Court of Appeals apparently agreed with that finding. Appendix, 56a-57a. Even evaluating the actions of the United States from a best efforts standpoint, the district court concluded that best efforts were not made. The extradition order was again vacated.

The United States and Switzerland appealed. On this second appeal, the Court of Appeals in effect overturned the district court's finding of an absolute promise and concluded that the agreement made by the United States was one to use best efforts. *Geisser II*, Appendix, pp. 73a-74a. The Court of Appeals, however, concluded that the district court was not clearly in error in ruling that the United States still had not used best efforts. Of importance to the Court's ruling was that the United States did not emphasize to the Swiss Government the

reasons underlying the original bargain, Ms. Bauer's admirable performance in keeping her part of it, her intense fears of reprisals and the conclusion of Government agents that her fears were well founded. The whole basis for the extradition aspect of the plea bargain was that Ms. Bauer feared that she would be killed by members of the conspiracy against whom she informed if she were returned to Switzerland. This fear was recognized as "fully warranted" by agents of the United States. *Geisser III*, n. 4, Appendix p. 13a. The case was remanded for the United States to use its best efforts to prevent Ms. Bauer's extradition.

After this remand, the United States began a series of communications with the Swiss Government, this time consisting of an informal conference followed by a diplomatic note and one exchange of notes. In one such note, the Secretary of State described the Government's prior efforts to avoid Ms. Bauer's extradition as follows:

> The United States Government has already gone to the United States District Court twice and to the United States Court of Appeals twice in support of the efforts of the Government of Switzerland to extradite Mrs. Bauer.

Geisser III n. 5, Appendix at p. 15a.

The notes and attachments thereto did outline the four matters to which reference was made in the Court of Appeals opinion concerning the reasons for the plea bargain and its performance. The Swiss Government continued to maintain its extradition request and both Switzerland and the United States moved to dismiss Ms. Bauer's habeas corpus petition and revoke her bond. Attached to the motion of the United States were the texts of the communications. A year passed during which time Ms. Bauer attempted to engage in discovery. These

attempts were opposed by the United States. Then another meeting was held between representatives of the Swiss and American Governments at which the Bauer case was summarized. Switzerland again refused to withdraw its extradition request. Finally, Ms. Bauer moved for her discharge. Without holding a hearing, the district court again found that the United States had failed to use best efforts on her behalf and ordered her released from any order relating to extradition. The United States and Switzerland again appealed.

Prior to the Court of Appeals' third opinion in this case, the courts had consistently recognized the tension between Ms. Bauer's constitutional right to have her plea bargain enforced under *Santobello v. New York*, 404 U.S. 257 (1971), and the United States' obligation to extradite her under its treaty with Switzerland. This tension had previously been resolved in favor of Ms. Bauer pursuant to the doctrine that individual constitutional rights take precedence over Government treaty obligations under *Reid v. Covert*, 354 U.S. 1 (1957).

On the third appeal, the Court of Appeals ruled that the district court's finding that the United States had not used best efforts to avoid extradition was clearly erroneous. It reasoned that further efforts would turn into a violation of treaty obligations and that the nature of the promise found cannot be taken to require such a violation. The Court noted that in view of the Swiss Government's representation of the United States in negotiations with Iran to free the hostages, Ms. Bauer's case could not take precedence over friendly and cooperative international relations such as would be marred if the treaty were breached. *Geisser III*, Appendix, pp. 21a-23a. Judgment was accordingly entered for the United States and Switzerland.

REASONS FOR GRANTING THE WRIT

I.

IF THE DOCTRINE STATED IN *REID v. COVERT*, 354 U.S. 1 (1957), THAT INDIVIDUAL CONSTITUTIONAL RIGHTS TAKE PRECEDENCE OVER GOVERNMENT TREATY OBLIGATIONS IS NOT YET SETTLED, IT SHOULD BE SETTLED BY THIS COURT. IF IT IS SETTLED, THE COURT OF APPEALS DECISION, WHICH TREATED MS. BAUER'S RIGHTS AS INFERIOR TO THE GOVERNMENT OBLIGATION, IS IN CONFLICT WITH IT.

This case presents a square conflict between the obligations of our country to Switzerland on the one hand and to Ms. Bauer on the other. Pursuant to its treaty on extradition with Switzerland, the United States has an obligation to extradite Ms. Bauer.

The United States is also obligated to Ms. Bauer. Ms. Bauer's rights in this case flow from constitutional doctrine expounded in *Santobello v. New York*, 404 U.S. 257 (1971). A person who is promised something in a plea bargain has the constitutional right to have the bargain enforced. Ms. Bauer made a plea bargain with the United States. In pursuance of it she waived a panoply of constitutional rights and gave enormous help to the United States' efforts at law enforcement. She did this at the risk that she would be killed by those against whom she informed if she were returned to Switzerland. This risk and her consequent fear is recognized as fully justified by United States officials, as it would be to anyone familiar with the sordid business of narcotics trafficking. To allay her fears, the United States promised, at least, to use its best efforts to avoid her return to Switzerland.

In assessing whether the United States complied with the plea bargain, a certain standard was used which took certain considerations as given. Thus, the Court below repeatedly stated that the treaty could not be violated—compliance with the plea bargain could not require so much. The Court viewed a possible violation of the treaty as necessarily leading to unfriendly relations with the Swiss, who are doing so much for us in connection with the Iran matter. Again, compliance with the plea bargain could not require the creation of delicate problems of international relations in world diplomacy. Appendix, pp. 21a-23a.

The standard used by the Court of Appeals, in effect, gave precedence to the obligation not to violate the treaty over the obligation not to violate Ms. Bauer's constitutional rights. This was contrary to *Reid v. Covert*, 354 U.S. 1, 17 (1957), where Mr. Justice Black, writing for a plurality of the Court, stated:

> There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.[5]

If Ms. Bauer's constitutional rights are superior to the treaty, any assessment of whether those rights were violated should be made without reference to a standard which implicitly holds that the treaty is superior.

Moreover, no small part of the rationale of the Court of Appeals was based on the idea that this case had to be

---

[5]The Government of Switzerland argued below that this plurality opinion was not binding as an opinion of this Court. If there is any question, but that this statement, based on numerous cases, does not accurately reflect the law, this Court should grant certiorari to settle this important matter.

decided with extreme deference to international diplomacy. Indeed, so much deference was used that the Court of Appeals stated that "best efforts cannot be interpreted as 'strongest possible efforts,' " Appendix p. 21a, when the actual words of the promise according to the promisor were, "I did state . . . on every occasion . . . that we would do everything possible. . . ." Appendix, p. 107a.

The Court of Appeals' perversion of the best efforts promise into one which would be satisfied no matter what the character of the efforts should again call to mind the words of Mr. Justice Black:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.
>
> *Reid v. Covert*, 354 U.S. 1, 14 (1957).

See also Torres v. Puerto Rico, 442 U.S. 465, 476 (1979) (Brennan, J., concurring).

The Court of Appeals decision was based on political expediency and on whatever inconvenience might be caused by a possible violation of the treaty. For the sake of unproven Swiss aid in connection with the now ended crisis in Iran, the Court sacrificed Ms. Bauer's rights under the Constitution. Appendix, pp. 21a-23a. The danger of such reasoning to our system of constitutional government which cherishes individual rights is apparent.

The United States used Ms. Bauer for its own purposes and reaped great benefit from such use. Under the Constitution, it should not now be allowed to turn its back on her.

This Court should grant certiorari to resolve this important question of individual constitutional rights in the context of international relations. This Court has shown a willingness in the past to examine cases such as this one which involve the relation of an international treaty to an individual's constitutional rights. *Reid v. Covert*, 354 U.S. 1 (1957). This case involves questions of first impressions before this Court: whether the enforcement of a plea bargain will prevail over an extradition treaty and to what extent it will prevail. Because of the importance of the answers to these questions as well as the importance of the subject area generally, a grant of a writ of certiorari is warranted.

II.

THE EXECUTIVE BRANCH HAS THE POWER TO DELAY OR DENY EXTRADITION UNDER THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND THE CONFEDERATION OF SWITZERLAND.

III.

UNDER A PLEA BARGAIN AGREEMENT WHICH BOUND THE EXECUTIVE BRANCH TO "DO EVERYTHING POSSIBLE" TO AVOID EXTRADITION, THE EXECUTIVE BRANCH IS OBLIGATED TO PREVENT EXTRADITION.

A. The Agreement.

In the words of the United States Attorney who actually struck the agreement with Ms. Bauer, the actual promise was that the United States "would do everything possible" to see that she was not deported or extradited to Switzerland. *Geisser I*, Appendix at pp. 38a-39a. Plea bargain agreements such as the above are either "specifically enforceable between the parties to the agreement or

the plea is void." *Gallegos v. United States*, 466 F.2d 740, 741 (5th Cir. 1972). As for withdrawing Ms. Bauer's plea, Judge Brown commented:

> [T]he avenues of redress available for Bauer are few. Eradicating the impact of her testimony is impossible. And, of course, an opportunity to replead seems superficial and unrealistic in view of her long confinement. Specific performance may well be the only way out to keep the bargain.
>
> *Geisser I*, Appendix at p. 50a.

In making this comment, *see also Geisser II*, Appendix at p. 81a, the Fifth Circuit acknowledged that Ms. Bauer was inalterably locked into the consequences of her agreement if not the agreement itself. Her crucial testimony which has caused her and various Government agents to fear for her life cannot be withdrawn. Therefore, the question remains as to whether the Government has the power to enforce the promise which was made to Ms. Bauer.

B. Power of the Executive to Delay or Deny Extradition.

The United States Court of Appeals recognized that this issue was present in this case and commented that the Secretary of State apparently had "discretion in declining extradition." *Geisser I*, n. 22, Appendix at p. 52a.[6] This discretionary power of the Executive is grounded in the actual language of the extradition statutes, which state that, "The Secretary of State *may* order the person . . . to be delivered to any authorized agent of

---

[6]Citing 4 Hackworth, *Digest of International Law* §338 (1942); 4 Moore, *International Law Digest* §616 (1906); Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313 (1962); *Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965).

such foreign government. . . ." 18 U.S.C. §3186, Appendix at p. 103a. (Emphasis added.) The Second Circuit accordingly noted that: "The Executive Branch . . . is empowered to make the final decision on extradition and has assumed the discretion to deny or delay extradition on humanitarian grounds." *Sindona v. Grant*, 619 F.2d 167, 176 (2d Cir. 1980).

C. The Obligation of the Executive to Delay or Prevent Extradition in This Case.

It is the petitioner's position that the Government has discretion to prevent her extradition. Actually, the Government has the obligation to place Ms. Bauer's constitutional rights over an offending portion of an international treaty whether discretionary or not. *Reid v. Covert*, 354 U.S. 1 (1957). The *Reid* treaty did not appear to be discretionary; nor did it involve a matter of lesser national and international importance than the extradition treaty involved here. The *Reid* case involved a Status of Forces Agreement which the Government argued was vital to national defense. *Reid, supra,* 354 U.S. at 15. Yet, the practical decision of this Court was to prohibit the Government from complying with the terms of that treaty. *Reid, supra,* 354 U.S. at 14-15. Thus, under the constitutional mandate of *Santobello v. New York*, 404 U.S. 257 (1971), whereby the Government's bargain with the defendant "must be fulfilled," *id.* at 262, the Executive Branch is obligated to utilize its discretion to avoid her extradition, *Sindona, supra;* or, if no discretion exists, simply to decline to comply with such treaty in this case. *Reid, supra.*

The question of the power to deny extradition is one of first impression in the Court. Because the existence of tension between constitutional rights and treaty obligations has called for the exercise of this Court's discretion

in the past, *Reid v. Covert*, 354 U.S. 1 (1957), and cases therein, this Court should grant certiorari in this case to address this issue in the specific context of extradition.

IV.

THE COURT OF APPEALS' FINDING THAT THE UNITED STATES HAD USED ITS "BEST EFFORT" TO AVOID MS. BAUER'S EXTRADITION TO SWITZERLAND, WHEN THE DISTRICT COURT HAD FOUND TO THE CONTRARY, CONSTITUTED SUCH AN EXTREME DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The proper and accepted course of judicial proceedings mandates that an appellate court is not to act as a factfinder. Rather the task of ascertaining where the truth lies is reserved for the district court.

Rule of Civil Procedure 52(a) provides that the district court shall find the facts and that such findings of fact are not to be set aside unless clearly erroneous. A finding is clearly erroneous not simply because the appellate court would have found otherwise, but only if on the entire evidence the appellate court is left with the definite and firm conviction that a mistake has been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). A mistake is said to be made when the trial court's findings are induced by an erroneous view of the law or when they lack substantial evidentiary support. *Whitson v. Yaffe Iron & Metal Corp.*, 385 F.2d 168 (8th Cir. 1967). On the other hand when the evidence, though conflicting, supports the findings, they are binding on appeal and may not be overturned. *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978).

What constitutes best efforts by a party will vary depending on the factual context. *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 266 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979); *Perma Research & Development Co. v. Singer Co.*, 308 F. Supp. 743, 748 (S.D.N.Y. 1970). Here, the factual context was such that the district court originally found that the United States had made an absolute promise that Ms. Bauer would not be extradited to Switzerland. Appendix at pp. 29a, 57a. The evidence before the district court supported this interpretation. Appendix at pp. 107a-113a. In addition, the ordinary meaning of the word best, i.e. "excelling or surpassing all others of its kind," Webster's Third New International Dictionary, p. 208 (1961), connotes that the efforts by the United States should not be minimal.

The district court found, in 1979, that the United States still had not used best efforts to avoid Ms. Bauer's extradition to Switzerland. The facts in the record which support the district court's finding are that the plea bargain was consummated in 1967. In the intervening 12 years, the United States had spent less than 11 months, at a rate of approximately one communication in each of those months, in a half-hearted effort to persuade the Swiss Government to withdraw its extradition request. Throughout its communications, the United States placed primary reliance on the fact that the courts were forcing it into a position which it felt was legally erroneous. As noted by the Secretary of State, the position of the United States had been consistently in support of the Swiss efforts to extradite. It is inconceivable that a party using best efforts to avoid extradition would spend seven years in court trying to effectuate extradition.

It is clear that had Ms. Bauer stood in the shoes of the United States, and had she engaged in the same tactics as

did the United States, no court would hold that she had used best efforts to comply with her part of the plea bargain. If after her 1967 plea bargain, Ms. Bauer had (1) avoided testifying except after years of litigation devoted to avoiding this obligation; (2) acted in complicity with an adverse party to prevent such testimony; and (3) acted in such a manner as to completely undercut and undermine the value of such testimony when it was finally given, it could not be said that she used "best efforts" to fulfill her bargain. Surely, the Government cannot beheld to any lesser standard than a criminal defendant in meeting its promises.

Moreover, one could well question what sort of persuasive powers the United States could have in its so-called efforts to avoid extradition when immediately before and immediately after those efforts, it took the position that extradition should proceed. This "schizophrenic position" of the United States was noted by the Court of Appeals. *Geisser I*, Appendix at p. 45a. Not once in the entire history of this case did the United States ever express a sincere and unqualified belief that Ms. Bauer should not be extradited. The power of persuasion must include a measure of sincerity to be effective so as to be called best efforts. Yet in all its communications with Switzerland, it was clear that the United States was pleading Ms. Bauer's case not because she had given invaluable information about drug smuggling, not because she helped the United States incarcerate a major drug dealer at the risk of her own life, not because she fulfilled her part of a solemn bargain with the United States, but rather the United States was pleading her case because the courts were making the United States do so. If Switzerland was unpersuaded, it is no wonder. The

United States' efforts to avoid extradition were so ingenuine in light of the position in favor of extradition that it has taken throughout this case that they could hardly be called "best efforts."

In addition, it is noteworthy that the district court took no evidence on the question of best efforts apart from the documents (letters, diplomatic notes and the like) which allegedly constituted the best efforts. Yet implicit in the second remand of this case, Appendix, pp. 63a-86a, was that the United States bore the burden of exercising best efforts and proving such to the district court. The Court of Appeals overturned the district court finding because best efforts only required full pursuit of the case through diplomatic channels and the letters and notes showed that this was done. However, the salient feature of this case is that there is not a shred of evidentiary support for the proposition that the letters and notes constituted such full pursuit. In the absence of evidence, the result reached by the Court of Appeals can only be based on sheer speculation, and that provides no basis for finding a district court to be in clear error. *Vohs v. Dickson*, 495 F.2d 607, 624 (5th Cir. 1974).

From the evidence before it, the district court was entitled to find that the United States did not use best efforts. Any contrary finding by the Court of Appeals is a classic usurpation of the power of the fact-finder in the first instance to find the facts. Such a departure from the settled and accepted rules governing appellate review should not be countenanced by this Court.

It is appropriate for this Court to grant certiorari to question whether the Court of Appeals properly discharged its appellate function of reviewing findings of fact. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 108 (1969). This Court should do so in this

case because the Court of Appeals was so clearly wrong and because of the dire consequences to Ms. Bauer of that error.

CONCLUSION

For the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

LYNN PICKARD
Post Office Box 2423
Santa Fe, New Mexico 87501
(505) 988-4469

WILLIAM C. MARCHIONDO
Post Office Box 568
Albuquerque, New Mexico 87103
(505) 247-0751

CHARLES LOUIS ROBERTS
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

Attorneys for Petitioner.

February 4, 1981